

Remarks

Claims 1, 2, 4, 9, 11, 12 and 43 are currently in the present application.

All claims have been rejected, under 35 USC § 103, based on the Nutramex Laboratories '816, Florio '715, Martino '692, Burger '919, Morad '594 and Versalla '878 references.

The claims of the present application have been amended to more specifically define the sweetener component of the beverage; that component must include erythritol in an amount such that it constitutes from about 0.25% to about 10% of the composition. It also must include an edible coloring agent. Antecedent basis is found in the present application at page 14, line 29; no new matter is included by virtue of this amendment. The claims have also been amended to specify that a coloring agent is present (basis at page 27, lines 19 *et seq*) and to define the maximum carbohydrate level in the compositions (basis at page 14, line 29).

None of the references cited by the Examiner disclose or suggest a beverage which combines a chondroprotective agent (and particularly not the three specific materials defined in claim 4) with erythritol. The Examiner states that the use of erythritol does not provide any unexpected results. In fact, the use of erythritol does provide unexpected results in the context of the beverage compositions of the present invention.

First, erythritol provides a color stability benefit to the beverage compositions. Attached is a Declaration under 37 CFR 1.32 of Robert J. Sarama. In the declaration, Mr. Sarama describes experiment which shows that a composition containing about 5% erythritol exhibited superior color stability when compared to a composition which included no erythritol. This benefit could not have been derived from the prior art references cited by the Examiner.

Further, erythritol uniquely has properties which make it useful in the compositions of the present invention (as opposed to other conventional non-caloric sweeteners). Specifically, in a beverage composition, sweeteners generally have to be used at higher levels. This is particularly true with sugar alcohols, such as erythritol. The use of such higher levels of sweeteners in a full beverage composition can cause the consumer gastrointestinal distress, which obviously is

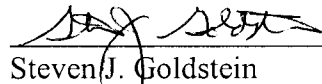
something the producer of the beverage would rather avoid. Since, erythritol is a small molecule, it passes through the body relatively easily and intact and, as a result, it does not cause the gastrointestinal distress frequently found with other sugar alcohol sweeteners. Thus, it cannot be said that all non-caloric sweeteners are equivalent and that the substitution of erythritol for another known sweetener is equivalent or obvious. In fact, the use of erythritol presents particular benefits (as defined above) in the context of a sports beverage composition (of which large quantities are frequently consumed in a short period of time), which is what is claimed in the present application. In addition, the use of erythritol provides a desirable textural quality (a desirable mouthfeel) to the beverage, which is not obtained when other sweeteners are used. All of these benefits are confirmed in the attached Sarama Declaration. Accordingly, the compositions claimed in the present application would not have been obvious based on the references cited by the Examiner, and it is respectfully requested that the § 103 rejection be withdrawn.

In light of the foregoing amendments and remarks, and the attached Sarama Declaration, it is submitted that the claims currently pending in the present application are now in form for allowance. Accordingly, reconsideration and allowance of the claims as amended herein, are earnestly solicited.

Respectfully submitted,

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